ELECTRICAL ANGELS MSC SDN BHD A

v.

PROTON EDAR SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR B
VAZEER ALAM MYDIN MEERA JC
[ORIGINATING SUMMONS NO: 24NCVC-500-02-2012]
5 AUGUST 2013

CIVIL PROCEDURE: *Committal proceedings - Application for - Parties entered into online dealing agreement - Failure to pay commission - Allegation of breach of agreement - Request for certain documents from defendant to compute quantum of commission - Non-compliance of court order - Whether amounts to contempt of court - Whether a deliberate disregard of court order - Whether actual order for discovery granted - Whether requirements under O. 45 Rules of Court 2012 complied - Whether order served personally to directors of company - Whether leave to issue committal proceedings granted* C D

The plaintiff and the defendant had entered into an agreement wherein the former appointed the latter as the exclusive online dealer of its Proton cars. The plaintiff alleged that the defendant had breached the agreement by failing to pay commission to the plaintiff for the years 2006 to 2009. The agreement also contained an arbitration clause which stipulated that disputes that could not be settled amicably are to be referred to an arbitrator. For the purposes of the arbitration proceedings, the plaintiff contended that it required certain documents to compute the quantum of commission. Hence, the present originating summons was filed against the defendant where the plaintiff sought an order for discovery and productions of the said documents. The court dismissed the application but the decision was reversed upon appeal to the Court of Appeal. The plaintiff proceeded to extract a sealed order of the Court of Appeal ('the COA order') and served it to the defendant, along with a notice requiring the latter to furnish the documents. In response, the defendant forwarded the documents but refused to give a digital soft copy of the same on the grounds that it was not part of the order. The defendant alleged that as a gesture of goodwill, it had forwarded a digital soft copy of the documents which also contained additional information *ie*, the physical addresses of the customers. The plaintiff, however, took a contrary stand and filed encl. 20 seeking *ex parte* leave pursuant to O. 52 r. 3 of the Rules of Court 2012 ('ROC') to issue committal proceedings against the directors of the defendant company. It was the plaintiff's contention that they were all in contempt of court for non-compliance of the COA order. E F G H I

Held (dismissing encl. 20):

(1) The company's directors are the directing mind and will of a company. They are the *alter ego* of the company and the real actors in the conduct of the company's affairs. Before a director or officer of a body corporate could be subjected to an order of committal for non-compliance of an order of court by that body corporate, it is necessary for that order of court to be first served personally on the said director. Otherwise, they cannot be said to have wilfully disobeyed the order. Service of an order on the solicitor of an alleged contemnor may not suffice. (paras 27 & 30)

(2) There was absolutely no evidence that the order of the Court of Appeal had been served on the directors against whom leave to issue committal proceedings is now being sought. Nor was there any evidence to show that these directors had been informed that they would be punished for contempt if they breached the said order. (para 32)

(3) Order 45 r. 7(4)(b) of the ROC makes it mandatory for any order served under that rule to incorporate a notice in Form 83 of the ROC informing the person on whom the order is served that if the body corporate neglects to obey the order within the time specified, the named director or officer of the body corporate would be liable to process of execution to compel the body corporate to obey it. This is termed as the 'penal endorsement' in legal parlance. However, no such penal notice was given to the directors. In fact, no such penal notice was incorporated in the Court of Appeal order. (para 36)

(4) There was no actual order of discovery from the Court of Appeal enjoining the defendant to produce the sales records within a specified time period. Period of time for compliance must be specified in the order for otherwise any non-compliance could not be wilful or in deliberate disregard of an order of the court. When there is no such actual order for discovery extracted and served, the compliance of the requirements of O. 45 of the ROC, generally becomes nigh impossible. The plaintiff should extract the proper sealed discovery order of the Court of Appeal with the requisite penal endorsement as per Form 83 and have that order served on the defendant's directors personally. Only then the plaintiff could apply for leave to issue committal proceedings against the said directors, if the defendant neglected to obey that order. (paras 37 & 38)

Case(s) referred to:

Arthur Lee Meng Kwang v. Faber Merlin (M) Bhd & Ors [1986] 2 CLJ 109; [1986] CLJ (Rep) 58 SC ***(refd)***

Capital Insurance Bhd v. BS Sidhu [1996] 3 CLJ 477 CA ***(refd)***

Datuk Hong Kim Sui v. Tiu Shi Kian & Anor [1987] 1 CLJ 438; [1987] CLJ (Rep) 1 PC ***(refd)***

Gribbles Pathology (M) Sdn Bhd v. Adventist Hospital & Clinic Services (M) Bhd (No 2) [2003] 1 CLJ 317 HC ***(refd)***

Loh Eng Leong & Ors v. Lo Mu Sen & Sons Sdn Bhd & Anor [2004] 3 CLJ 675 CA ***(refd)***

Messrs Hisham, Sobri & Kadir; Advocates & Solicitors v. Kedah Utara Development Sdn Bhd & Anor [1988] 2 CLJ (Rep) 5 HC ***(refd)***

Nor Aslan Abd Hamid & Ors v. Abdul Jalil Abdul Hamid & Ors; Muhammad Fauzi Shamsuddin & Ors (Interveners) [2006] 8 CLJ 296 HC ***(refd)***

Ronson Products Ltd v. Ronson Furniture Ltd [1966] 2 All ER 381 ***(refd)***

Sykt M Mohamed v. Mahindapal Singh Joginder Singh & Ors [1991] 1 CLJ 582; [1991] 4 CLJ (Rep) 16 HC ***(refd)***

Sykt Perumahan Pegawai Kerajaan Sdn Bhd v. Sri Komakmur Sdn Bhd (2) [1998] 3 CLJ 841 HC ***(refd)***

Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors [2012] 2 CLJ 849 FC ***(refd)***

Tan Sri G Darshan Singh v. Tetuan Azam Lim & Pang [2013] 1 CLJ 1060 CA ***(refd)***

Tiger Powerhitz Sdn Bhd v. Guinness Anchor Marketing Sdn Bhd [2003] 5 CLJ 78 HC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 45 rr. 5, 7(3), (4)(b), O. 52 rr. 2(2), 3(1)

For the plaintiff - Rabinder Singh (Nurhayati Zaabar with him); M/s Rabinder Budiman & Assocs

For the defendant - M/s Albar & Partners

Reported by Najib Tamby

JUDGMENT

Vazeer Alam Mydin Meera JC:

[1] These are my grounds of decision for dismissing encl. 20, which is the plaintiff's *ex parte* notice of application for leave of court to issue committal proceedings against the directors of the defendant company.

[2] The facts leading to this application are as follows. The plaintiff and defendant had entered into an agreement dated 14 June 2006 ("the agreement") wherein the plaintiff appointed the defendant as the exclusive online dealer of its Proton cars subject to the terms and conditions therein.

[3] The plaintiff alleges that the defendant in breach of the agreement had failed to pay commission to the plaintiff in accordance to the terms of the agreement for the years 2006 to 2009.

[4] There is an arbitration clause in the agreement and disputes that cannot be settled amicably are to be referred to an arbitrator (see cl. 13 of the agreement).

[5] The plaintiff states that it requires these documents to compute the quantum of commission due and thereafter commence the arbitration proceedings. Hence, the plaintiff through this originating summons sought an order for discovery and production of documents in the following terms:

> Defendan mengemukakan rekod jualan kereta yang di bawah jenama Proton bagi tahun 2006 hingga 2009 dan apa-apa dokumen yang berkaitan dengan data jualan bagi tahun 2006 hingga 2009 yang mengandungi sufficient key data pelanggan termasuklah nama pelanggan, alamat emel pelanggan dan nombor telefon pelanggan.

[6] I had dismissed that application on 11 May 2012 for reasons that I had stated in my grounds of decision. The plaintiff appealed against that decision to the Court of Appeal. The Court of Appeal allowed the appeal on 10 October 2012.

[7] The plaintiff's solicitors then proceeded to extract the sealed order of the Court of Appeal (exh. PM-4 in affidavit of Pete Meehan dated 7 May 2013). The relevant body of the order of the Court of Appeal dated 10 October 2012 reads as follows:

> RAYUAN INI ditetapkan untuk pendengaran pada hari ini dalam kehadiran Dato' Rabinder Singh (Rajeswari Paramasevam bersamanya), peguam bagi pihak Perayu dan V. Vijakumar, peguam bagi pihak Responden DAN SETELAH MEMBACA Rekod Rayuan yang difailkan di sini DAN SETELAH MENDENGAR hujahan peguam-peguam yang hadir MAKA ADALAH DENGAN SEBULAT SUARA DIPERINTAHKAN bahawa:
>
> (a) rayuan Perayu dibenarkan;
>
> (b) kos sebanyak RM10,000.00 dibayar kepada Perayu oleh Responden;
>
> (c) deposit sebanyak RM500.00 dikembalikan kepada Perayu.
>
> DIBERI di bawah tandatangan saya dan Meterai Mahkamah pada 10 haribulan Oktober 2012.

[8] Now, what is peculiar here is that the order of the Court of Appeal merely states that the appeal is allowed. The order does not spell out the terms and parameters of the discovery or production of documents ordered against the defendant. There is no proper sealed 'order for discovery' extracted by the plaintiff. The plaintiff's solicitors ought to have extracted an order that spells out the exact terms of the discovery and production of documents, which would have been reflective of the prayers for relief sought in the originating summons. In the absence of that, as the unfolding events would show, the parties had resorted to reading the order of the Court of Appeal dated 10 October 2012 together with the prayers for relief sought in the originating summons to conjecture and surmise as to what the 'order for discovery' ought to be.

[9] The said order of the Court of Appeal was served on Messrs Albar & Partners, the solicitors for the defendant, under cover of the plaintiff's solicitors' letter dated 26 November 2012 (exh. PM-5 in affidavit of Pete Meehan dated 7 May 2013). In that letter of 26 November 2012, the plaintiff's solicitors by reference to the order of the Court of Appeal, gave notice to the defendant's solicitors as follows:

> TAKE NOTICE pursuant to the above you are required to furnish our client with your record of sales for the vehicles under the Proton's brand commencing from the year 2006 to 2009 and documents in relation to sales records of the vehicles under the Proton's brand from the year 2006 to 2009 including but not limited to the details of your customers' name, contact number, email address, branch, model of the vehicle bought, and any special request from your customers.

[10] A first glance reading of the above notice seems to indicate that what is being sought from the defendant is couched in much broader terms than the prayer for relief sought in the originating summons (see para. 5 above).

[11] The defendant's solicitors, in response to that demand, had by letter dated 3 December 2012 (exh. PM-6 in affidavit of Pete Meehan dated 7 May 2013) forwarded to the plaintiff's solicitors the sales records for period starting from 15 June 2006 till end January 2009. The defendant's solicitors informed the plaintiff's solicitors that the sales records for the remaining period of February 2009 till 14 June 2009 would be forwarded in due course as the defendant was facing "technical glitches" in the retrieval of these records from their system. The defendant's solicitors had in that letter made it clear that the sales records were being forwarded "as per the Court of Appeal Order read together with the originating summons". In that letter, the defendant's

A solicitors also informed the plaintiff's solicitors that based on the sales records in the defendant's possession "the customers' email addresses are not recorded as that is not required by our client for the purposes of the sales records".

B **[12]** Subsequently, by letter dated 10 December 2012 (exh. PM-8 in affidavit of Pete Meehan dated 7 May 2013) the defendant's solicitors forwarded to the plaintiff's solicitors the remainder of the sales records for the period February 2009 till 14 June 2009. However, the defendant's solicitors refused to give a digital soft copy of the entire sales records as requested by the plaintiff's solicitors on grounds that it C is not part of the order. Of course there is no mention of a digital soft copy in the prayer for relief in the originating summons.

[13] The plaintiff's solicitors then wrote letter dated 11 December 2012 (exh. PM-9 in affidavit of Pete Meehan dated 7 May 2013) reiterating D their earlier request for a digital soft copy of the sales records. Thereafter, by another letter dated 21 January 2013 (exh. PM-10 in affidavit of Pete Meehan dated 7 May 2013), the plaintiff's solicitors complained that the sales records that had been furnished were incomplete and that they were also lacking in material particulars including email addresses, physical addresses and phone numbers of the E customers. In the circumstance, the plaintiff's solicitors alleged that the defendant was in breach of the order of the Court of Appeal and demanded the production of "the balance of 207,000 records of sales" as well as the additional contact details of the customers.

F **[14]** The defendant's solicitors then replied *vide* their letter dated 25 January 2013 (exh. PM-11 in affidavit of Pete Meehan dated 7 May 2013), refuting the allegations of the plaintiff's solicitors contained in the aforesaid letter of 21 January 2013 and denied that the defendant was in breach of the Court of Appeal's order. The defendant's solicitors G reaffirmed the defendant's position that all available sales record has been produced and hard copies furnished.

[15] It is evident from the contents of the defendant's solicitors' letter of 25 January 2013 that the parties were at odds as to what the actual 'discovery order' (which was never extracted) should read. The H defendant's solicitors took the view that the information now being sought by the plaintiff's solicitors were in the nature of "further and better particulars" and were over and above that which was encompassed in the un-extracted 'discovery order'.

I **[16]** In any event, the defendant's solicitors replied, on a without prejudice basis, stating that their client would endeavour to retrieve the physical addresses of the customers, provided the same were available

in their records and would forward them in due course. Once again the defendant's solicitors refused to forward a digital soft copy of the records.

[17] The plaintiff's solicitors then replied *vide* their letter dated 27 February 2013 (a long four page letter marked as exh. PM-12 in affidavit of Pete Meehan dated 7 May 2013). Again there was argument as to what the 'discovery order' of the Court of Appeal (that was not extracted) should read. Again, the plaintiff's solicitors alleged that there was non-compliance of the order of the Court of Appeal.

[18] The defendant's solicitors *vide* letter dated 8 March 2013 (three pages long and marked as exh. PM-13 in affidavit of Pete Meehan dated 7 May 2013), replied once again denying that the defendant was in breach of any order of court. The defendant took the position that they have complied with the terms of the Court of Appeal's order. The defendant's solicitors had however as a gesture of goodwill forwarded a digital soft copy of the sales records to the plaintiff's solicitors under cover of that letter. That digital soft copy of the sales records also contained the additional information, ie, the physical addresses of the customers, which according to the defendant's solicitors is over and above the requirement under the terms of the Court of Appeal's order. With that, the defendant's solicitors took the position that the defendant has fully complied with the terms of the said order.

[19] However, the plaintiff's solicitors took a contrary stand, and this was reiterated in their letter dated 11 April 2013 (exh. PM-14 in affidavit of Pete Meehan dated 7 May 2013). The defendant's solicitors replied that letter by their letter of 18 April 2013 reiterating their position that the defendant has complied with the Court of Appeal's order.

[20] The plaintiff then filed encl. 20 seeking *ex parte* leave pursuant to O. 52 r. 3 of the Rules of Court 2012 to issue committal proceedings against the directors of the defendant company, as well as the directors of another company called Proton Marketing Sdn Bhd, on grounds that they were all in contempt of court for non-compliance of the order of the Court of Appeal dated 10 October 2012.

[21] When counsel for the plaintiff appeared before me on the first return date for encl. 20, I enquired as to the relevance of citing the directors of Proton Marketing Sdn Bhd, who were non-parties to this suit, for contempt. Counsel for the plaintiff did not proffer any reasonable explanation or grounds as to the culpability of Proton Marketing Sdn Bhd or its directors or officers in respect of any alleged breach or disobedience of an order of court issued in this proceeding. This, to me, is clear abuse of process.

[22] In the face of that query, counsel for the plaintiff withdrew the prayers in para. 1(ii) of encl. 20 which sought leave to issue committal proceedings against the directors of Proton Marketing Sdn Bhd and confined the *ex parte* application for leave to issue committal proceedings only against the six directors of the defendant, namely:

(i) Dato' Sri Hj Mohd Khamil bin Jamil

(ii) Chan Choy Lin

(iii) Dato' Abdul Harith bin Abdullah

(iv) Dato' Sri Che Khalib bin Mohamad Noh

(v) Soo Thean Hin

(vi) Dato' Lukman bin Ibrahim

[23] Counsel for the plaintiff submitted based on the strength of the Court of Appeal decision in *Loh Eng Leong & Ors v. Lo Mu Sen & Sons Sdn Bhd & Anor* [2004] 3 CLJ 675 that when the Court of Appeal acts in its appellate jurisdiction, any order may by the Court of Appeal had to be enforced by the court that ought to have made it. I accept that argument and agree that this court has the jurisdiction and power to enforce the order made by the Court of Appeal on 10 October 2012, as this is the court that ought to have made it.

[24] It is trite law that since committal process is in the nature of quasi criminal proceedings and since the liberty of the subject is at stake, strict procedural compliance is required (see the judgment of Arifin Zakaria CJ in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849 at p. 861). The law recognises that the resort to initiate contempt proceedings and labelling a party an alleged contemnor ought to be done with much circumspection as the mere fact of being cited for contempt carries with it serious consequences. It is akin to a criminal charge being preferred against the alleged contemnor and the court in considering whether to grant leave has to be satisfied that there is sufficient material for such a charge to be laid and that the alleged contemnor ought to be called to answer that charge.

[25] It is primarily for this reason that the law has provided procedural safeguards in the form of leave of court being first obtained even before committal proceedings are allowed to commence. Even though the leave of court is obtained *ex parte* (see O. 52 r. 3(1) of the Rules of Court 2012), the applicant is required to fully and fairly set out the facts giving rise to the alleged act of contempt. The applicant is also required to include facts that are likely to be raised by the alleged contemnor in

opposing the application, as if it were an *inter partes* application (see judgment of Abdul Wahab Patail JCA in *Tan Sri G Darshan Singh v. Tetuan Azam Lim & Pang* [2013] 1 CLJ 1060 at p. 1068, CA). A

[26] It is also the requirement of law that the alleged act of contempt must be sufficiently described and particularised in the statement required under O. 52 r. 2(2) of the Rules of Court 2012 (see the cases of *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849; *Arthur Lee Meng Kwang v. Faber Merlin (M) Bhd & Ors* [1986] 2 CLJ 109; [1986] CLJ (Rep) 58; *Sykt M Mohamed v. Mahindapal Singh Joginder Singh & Ors* [1991] 1 CLJ 582; [1991] 4 CLJ (Rep) 16). B C

[27] The law recognises that the company's directors are the directing mind and will of a company. They are the *alter ego* of the company and the real actors in the conduct of the company's affairs. The directors are reposed with responsibility for the management of the company and are liable to process of execution when any court order, of which they have knowledge, is wilfully disobeyed. This, fact is recognised and given effect to in O. 45 r. 5 of the Rules of Court 2012. D

[28] The Privy Council in *Datuk Hong Kim Sui v. Tiu Shi Kian & Anor* [1987] 1 CLJ 438; [1987] CLJ (Rep) 1 after having considered the provisions of O. 45 r. 5 and r. 7 of the Rules of the High Court 1980 (then existing), opined as follows: E

> Thus the rules recognise that directors and officers are the human agencies responsible for the conduct of the affairs of companies. They fix a director with liability for the conduct of the company and so with liability for any breach by the company of an injunction where the director has appropriate notice that he is liable to process of execution if the company disobeys the order. F

[29] The rules of court referred to by the Privy Council in *Datuk Hong Kim Sui (supra)* are in *pari materia* with O. 45 r. 5 and r. 7 of the Rules of Court 2012 which provides that: G

> 5(1) Where:
>
> (a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or, as the case may be, within that time as extended or abridged under Order 3, rule 5; or H
>
> (b) …
>
> then, subject to the provisions of these rules, the judgment or order may be enforced by one or more of the following means, that is to say: I
>
> (A) …

A (B) where that person is a body corporate, with the leave of the Court, an order of committal against any director or other officer of the body; ...

7(1) ...

B (2) ...

(3) Subject as aforesaid an order requiring a body corporate to do or abstain from doing an act shall not been enforced as mentioned in rule 5(1) (B) or (C) unless:

C (a) a copy of the order has also been served personally on the officer against whom an order of committal is sought; and

(b) ...

(4) There shall be indorsed on the copy of an order served under this rule a notice in Form 83 informing the person on whom the D copy is served:

(a) ...

(b) in the case of service under paragraph (3), that if the body corporate neglects to obey the order within the time specified or, E if the order is to abstain from doing an act, that if the body corporate disobeys the order, the body corporate is liable to process of execution to compel the body to obey it.

[30] Therefore, it is abundantly clear that, before a director or officer of a body corporate can be subjected to an order of committal for non- F compliance of an order of court by that body corporate, it is necessary for that order of court to be first served personally on the said director. Service of an order on the solicitor of an alleged contemnor may not suffice. Such service has been held to be not in accord with the provisions of O. 45 r. 7 of the Rules of Court (see the judgment of G Raus Sharif J (as he then was) in the case of *Nor Aslan Abd Hamid & Ors v. Abdul Jalil Abdul Hamid & Ors*; *Muhammad Fauzi Shamsuddin & Ors (Interveners)* [2006] 8 CLJ 296). The law requires personal service of the order of court on the directors or officers of the company as otherwise they cannot be said to have wilfully disobeyed the order (see H *Capital Insurance Bhd v. BS Sidhu* [1996] 3 CLJ 477).The rationale for personal service is well stated by Stamp J in *Ronson Products Ltd v. Ronson Furniture Ltd* [1966] 2 All ER 381; Ch 603 at 614 in the following terms:

I If a man be ordered to do an act, so that his failure to do it may lead him to prison, justice requires that he know precisely what he has to do and by what time he has to do it, ...

[31] Further, Edgar Joseph Jr J (later FCJ) in *Messrs Hisham, Sobri & Kadir; Advocates & Solicitors v. Kedah Utara Development Sdn Bhd & Anor* [1988] 2 CLJ (Rep) 5 in construing the culpability of a director of a company for contempt of court when an order of court is breached by the company had this to say:

> ... for when, as here, the Consent Order was one requiring the Company which was a body corporate to do a positive act as opposed to prohibiting an act, and it had failed to comply with the same, on that alone, enforcement proceedings could have been brought against a Director or other officer of the Company, provided there was proof of due service on the Director or officer concerned of the Consent Order bearing the penal endorsement in the terms prescribed by O. 45 r. 7(4) and Form 87 Appendix A. (See *Ronson Products Ltd. v. Ronson Furniture Ltd.* [1966] 2 All ER 381).

[32] In the face of these strident and stringent requirement of the law, I have perused the statement and the affidavit verifying statement filed herein, and found that there is absolutely no evidence that the order of the Court of Appeal said to have been infringed by the defendant had been served on the six directors against whom leave to issue committal proceedings is now being sought. Nor is there any evidence to show that these directors had been informed that they would be punished for contempt if they breached the said order. I then enquired from counsel for the plaintiff, whether the order of the Court of Appeal had been served on these six directors. The answer was in the negative. I could have dismissed encl. 20 there and then for non-compliance of the O. 45 r. 7(3) of the Rules of Court 2012. However, counsel for the plaintiff prayed for time to serve the said order and the relevant cause papers on the defendant's directors.

[33] Seeing the hopelessness of the plaintiff's application, I then suggested to counsel for the plaintiff that, since the present impasse between parties seems to have surfaced from differences of opinion as to what the 'order of discovery' flowing from the Court of Appeal's order dated 10 October 2012 actually enjoins the defendant to do, it may be more prudent for counsel for both parties to appear before me to sort out the actual terms of the order and see to it that there is full and proper compliance. The appearance of both counsels for the parties before me to sort out the terms of the discovery order would have resolved the issue.

[34] However, counsel for the plaintiff did not take up on that suggestion and insisted on proceeding with this ill-fated and hopeless application and pressed for an adjournment to serve the relevant cause papers on the directors of the defendant. I granted the adjournment sought on account of counsel's plea to correct the shortcomings in the plaintiff's application, if at all that was even possible.

[35] Thereafter, counsel for the plaintiff appeared before me on three subsequent occasions; and still there was no proof of compliance of the above stated rules forthcoming from the plaintiff. In fact on the date when I dismissed encl. 20, there was absolutely no evidence of service of the said order on the six directors. Therefore, there is clear non-compliance of the mandatory requirement of O. 45 r. 7(3) of the Rules of Court 2012 to serve the order on the directors of the defendant personally before they can be liable to an order of committal.

[36] There is another fatal flaw in the plaintiff's application. Order 45 r. 7(4)(b) of the Rules of Court 2012 makes it mandatory for any order served under that rule to incorporate a notice in Form 83 of the Rules of Court informing the person on whom the order is served that if the body corporate neglects to obey the order within the time specified therein, then the named director or officer of the body corporate is liable to process of execution to compel the body corporate to obey it. This is termed as the 'penal endorsement' in legal parlance. However, there is no such penal notice given to the directors. In fact no such penal notice is incorporated in the order dated 10 October 2012. In the case of *Messrs Hisham, Sobri & Kadir; Advocates & Solicitors v. Kedah Utara Development Sdn Bhd & Anor (supra)* Edgar Joseph Jr J (later FCJ) held:

> Since it was common ground that neither the Company nor the alleged contemnors were served with the Consent Order bearing the appropriate penal endorsement, duly or at all, as required under O. 45 r. 7(4), the application for committal was fatally flawed on this ground as well. (See, for example, *Arumugam v. Suppiah Chettiar* [1935] MLJ 4; *The Venda* [1960] MLJ 283).

(See also the cases of *Gribbles Pathology (M) Sdn Bhd v. Adventist Hospital & Clinic Services (M) Bhd (No 2)* [2003] 1 CLJ 317; *Sykt Perumahan Pegawai Kerajaan Sdn Bhd v. Sri Komakmur Sdn Bhd (2)* [1998] 3 CLJ 841; *Tiger Powerhitz Sdn Bhd v. Guinness Anchor Marketing Sdn Bhd* [2003] 5 CLJ 78 on the strict requirement for penal endorsement.) As such the plaintiff's application herein is also fatally flawed.

[37] A further pitfall that the plaintiff would have had to surmount is the fact that there is no actual order of discovery from the Court of Appeal enjoining the defendant to produce the sales records within a specified time period. Period of time for compliance must be specified in the order for otherwise any non-compliance cannot be wilful or in deliberate disregard of an order of the court (see *Nor Aslan Abd Hamid & Ors v Abdul Jalil Abdul Hamid & Ors; Muhammad Fauzi Shamsuddin & Ors (Interveners) (supra)*).

[38] When there is no such actual order for discovery extracted and served, the compliance of the requirements of O. 45, generally, of the Rules of Court 2012 becomes nigh impossible. The plaintiff and its counsel should first extract the proper sealed discovery order of the Court of Appeal with the requisite penal endorsement as per Form 83, and have that order served on the defendant's directors personally. Only then, can the plaintiff apply for leave to issue committal proceedings against the said directors, if there is neglect to obey that order by the defendant.

[39] In the premise of the foregoing, I find that encl. 20 is flawed and is clear abuse of process. Wherefore, I dismissed encl. 20.